UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 54

Docket No. DC-1221-10-0488-W-1

David Usharauli,

Appellant,

v.

Department of Health and Human Services,

Agency.

May 19, 2011

David Usharauli, Rockville, Maryland, pro se.

Jennifer Blake, Esquire, Washington, D.C., for the agency.

Roman Lesiw, Esquire, Bethesda, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115(d), VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On January 30, 2009, the agency appointed the appellant to the position of Research Fellow at the National Institutes of Health (NIH)/National Institute of Allergy and Infectious Diseases (NIAID)/Division of Intramural Research (DIR)/Laboratory of Cellular and Molecular Immunology (LCMI). The Standard Form 50 documenting the appointment indicated that it was in the excepted service; it was not-to-exceed February 20, 2010; and it was made pursuant to 42 U.S.C. § 209(g). It also indicated, however, that the appointment was subject to completion of a 2-year initial probationary period.[1] Initial Appeal File (IAF), Tab 12, Subtab 4N. The appellant's first-level supervisor was Polly Matzinger, Ph.D., Senior Investigator, T Cell Tolerance and Memory Section (TCTMS) in the LCMI; his second-level supervisor was Ronald Schwartz, Ph.D., Chief, LCMI; and his third-level supervisor was Kathryn Zoon, Scientific Director, NIAID. *Id.*, Tab 13 at 5.

¶3 In a December 11, 2009 e-mail entitled "Follow-up to our meeting," Zoon informed the appellant that, as discussed in their December 9, 2009 meeting, "your appointment expires on February 20, 2010 and you were informed that it would not be extended." IAF, Tab 1 at 12. Zoon also stated that, on that date, "[y]ou were placed on administrative leave and banned from campus because of the way you conducted yourself." *Id.* She informed the appellant, however, that effective December 14, 2009, his status would be changed to work status and he would be allowed to work from home, although he would be required to use his

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[1] The appellant's curriculum vitae indicates that, prior to this appointment, he had worked as a Visiting Fellow at LCMI since January 2004. Initial Appeal File, Tab 12, Subtab 40; *see, e.g., Ingram v. Department of the Army*, 114 M.S.P.R. 43, ¶ 10 (2010) (in determining whether the appellant has made a non-frivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive).

personal e-mail account and would be prohibited from campus access. *Id.* The appellant's appointment terminated on February 20, 2010. IAF, Tab 1 at 11; Tab 12, Subtab 4G.

¶4 In his IRA appeal, the appellant alleged that, on December 9, 2009, he was placed on administrative leave, and his term appointment was allowed to expire at the end of the initial 13-month period, rather than being extended, in reprisal for whistleblowing. IAF, Tab 1 at 4, 9, 11-12. The administrative judge issued a show-cause order setting forth the requirements for proving jurisdiction over an IRA appeal. *Id.*, Tab 5. Both the appellant and the agency responded to the order. *Id.*, Tabs 6, 7, 12, 13.

¶5 The administrative judge then issued another show-cause order informing the appellant that he might not be entitled to file an IRA appeal because 42 U.S.C. § 209(g) provides that his appointment was made "without regard to the civil-service laws." IAF, Tab 14 at 1. The administrative judge distinguished *Fishbein v. Department of Health & Human Services*, 102 M.S.P.R. 4 (2006), in which the Board found that an appellant appointed under 42 U.S.C. § 209(f), a provision with the same language, was not precluded by that language from filing an IRA appeal over his termination. The administrative judge further found that there appeared to be no corrective action that the Board could order with respect to the appellant's claim that he was placed on administrative leave in reprisal for his alleged whistleblowing. The administrative judge therefore ordered the appellant to file evidence and argument to prove that the agency's determination not to provide him with another temporary appointment under 42 U.S.C. § 209(g) was a matter for which he was entitled to file an IRA appeal and that his placement on administrative leave was not a moot issue. *Id.* at 2-3. The appellant responded to the show-cause order, IAF, Tab 15, but the agency declined to address whether the Board has jurisdiction over IRA appeals "filed by [a]gency employees hired under its 42 U.S.C. § 209(g) appointment authority," *id.*, Tab 16 at 4.

¶6 The administrative judge dismissed the IRA appeal without affording the appellant his requested hearing after finding that he failed to make a non-frivolous allegation of Board jurisdiction. Initial Decision (ID) at 1, 5. The administrative judge interpreted *Fishbein*, 102 M.S.P.R. 4, to mean that "an individual appointed pursuant to 42 U.S.C. § 209(f) may bring an IRA appeal based on matters occurring during the course of his employment but may not bring an IRA appeal based on the appointment itself." *Id.* at 3-4. He found that the appellant's circumstances were dissimilar to Fishbein's because the appellant's employment was not terminated for cause prior to the expiration of his appointment "and this IRA appeal is not based on such an action." He found that, instead, the appellant's complaint concerned the agency's determination not to give him another appointment under 42 U.S.C. § 209(g). Citing *Fishbein*, 102 M.S.P.R. 4, ¶ 9, he found that such determinations made pursuant to the agency's "flexible hiring authority," are "exempt[ ] from the application of the civil-service laws." *Id.* at 4.

¶7 The administrative judge acknowledged the appellant's argument that he is an "employee" under 5 U.S.C. § 2105 entitled to file an IRA appeal and that the "without regard to the civil-service laws" language in 42 U.S.C. § 209(g) does not refer to the "appointment" itself, but rather to the individual scientist's qualification and rating for the appointment. The administrative judge found, though, that the appellant "adduced no evidence to corroborate these assertions." ID at 4. The administrative judge further cited the appellant's statement that, if the agency's representation that he was not placed on administrative leave was accurate, he would "agree with the Board to consider the question of [his] placement on administrative leave at this point of time a moot issue . . . ." *Id.* at 4-5.

¶8 The administrative judge concluded that the appellant could not bring an IRA appeal concerning the agency's "failure to give [him] a second fellowship appointment under 42 U.S.C. § 209(g)" because that matter was exempt from the

application of the civil-service laws. ID at 5. He further concluded that the appellant's purported placement on administrative leave was moot. *Id.* In light of that, he made no findings concerning whether the appellant was an "employee" in a "covered position" protected by the Whistleblower Protection Act (WPA), and whether the appellant made non-frivolous allegations that he engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8) and that the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a).[2] ID at 5 n.2.

¶9 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has not responded to the petition for review.

ANALYSIS

The administrative judge erred in finding that the appellant could not bring an IRA appeal because appointments under 42 U.S.C. § 409(g) are made "without regard to the civil-service laws."

¶10 It is well established that the WPA is a remedial statute, and we are required to construe its terms liberally to embrace all cases fairly within its scope so as to effectuate its purpose. *See, e.g.*, *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 9 (2010); *Fishbein*, 102 M.S.P.R. 4, ¶ 8. Further, our reviewing court has found that the language used in 5 U.S.C. § 2302(b)(8) indicates that Congress's intent was to legislate in "broad terms" and that, "absent some exclusionary language, a cramped reading of the statute . . . would be counter to that intent." *Weed*, 113 M.S.P.R. 221, ¶ 9 (quoting *Reid v. Merit Systems Protection Board*, 508 F.3d 674, 677 (Fed. Cir. 2007)). Consistent with

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[2] Although the administrative judge noted that the appellant had filed a complaint with the Office of Special Counsel (OSC) and that OSC had terminated its inquiry and informed the appellant that he had the right to seek corrective action from the Board, ID at 3, the administrative judge did not make a specific finding concerning whether the appellant had exhausted his administrative remedies before OSC.

that finding, the Board has found that Congress's intent in drafting 5 U.S.C. § 2302(a)(2)(A), which defines "personnel actions," was to protect whistleblowers from a broad range of possible retaliatory actions from government agencies. *See Weed*, 113 M.S.P.R. 221, ¶ 10.

¶11 The WPA covers the failure to make an appointment in the federal service when that action is because of a protected disclosure. *See Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323, 1325 (Fed. Cir. 2006). Similarly, the failure of an agency to renew an employee's temporary appointment[3] constitutes a failure to take a "personnel action" as that term is defined in 5 U.S.C. § 2302(a)(2)(A) for purposes of an IRA appeal. *See, e.g., Kern v. Department of Agriculture*, 48 M.S.P.R. 137, 140-41 (1991). Likewise, the expiration of an appointment resulting from the agency's failure to extend the appointment is a "personnel action" under 5 U.S.C. § 2302(b)(8). *See Special Counsel v. Department of the Army*, 48 M.S.P.R. 13, 16 (1991).

¶12 We agree with the appellant that the "without regard to the civil-service laws" language in 42 U.S.C. § 209(g) does not affect his right to file an IRA appeal over the agency's decision, whether it is characterized as a decision to not appoint him to a second term, to not re-appoint him, to not renew or extend his appointment, or to let his appointment expire. In *Young v. Federal Mediation and Conciliation Service*, 93 M.S.P.R. 99, ¶ 8 (2002), the Board considered 29 U.S.C. § 172(b), which similarly provided that the agency "may, without regard to the provisions of the civil service laws, appoint such conciliators and mediators as

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[3] Although the Standard Form 50 documenting the appellant's appointment referred to it as a temporary appointment, IAF, Tab 12, Subtab 4N, it appears that the appellant correctly referred to it as a term appointment because it was for a period exceeding 1 year, *see, e.g., Murdock-Doughty v. Department of the Air Force*, 74 M.S.P.R. 244, 251 (1997); 5 C.F.R. §§ 316.301, 316.401. In any event, whether it was a temporary or term appointment does not affect our analysis.

may be necessary to carry out the functions of [the agency]." There, the Board stated:

> The Office of Personnel Management has written that when an agency is authorized to make appointments without regard to the civil service laws, the agency is thereby empowered to make such appointments "without regard to the usual competitive or civil service laws, *including veterans' preference*." 58 Fed.Reg. 13,191, 13,192 (Mar. 10, 1993) (explaining regulations implementing the Civil Service Due Process Amendments) (emphasis added). This statement is a common-sense gloss on statutory language permitting appointment without regard to civil service laws, and we follow it here.

Id., ¶ 8. Further, in *Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985), the U.S. Court of Appeals for the Federal Circuit considered that the language in 16 U.S.C. § 831b providing for the appointment of agency employees "without regard to the civil service laws" exempted the agency from conditioning its appointments on passage of competitive examinations. Thus, the Board and the court have interpreted this phrase, consistent with the appellant's arguments reiterated in his petition for review, PFR at 9-14, to refer to matters concerning the method by which an applicant's qualifications for appointment to a position should be determined.

¶13 In any event, we find that the appellant would not be precluded from bringing an IRA appeal even if the "without regard to the civil-service laws" language in 42 U.S.C. § 209(g) and *Fishbein*, 102 M.S.P.R. 4, are interpreted to preserve such a right only for "personnel actions" occurring before the stated expiration of a temporary or term appointment. The administrative judge basically recharacterized the appellant's argument and considered the agency's action or lack of action on February 20, 2010, without regard to the undisputed incidents occurring during the course of the appellant's appointment. But the appellant's IRA appeal alleged that the personnel action was taken on December 9, 2010, when Zoon informed him that he would not be reappointed, not on February 20, 2010. IAF, Tab 1 at 4, 9, 12. The appellant also identified

December 9, 2010, as the date of the action in his OSC complaint. *Id.*, Tab 6 at 3-5. Similarly, the record shows that the agency did not re-appoint him because of concerns over his actions that occurred before his appointment's scheduled expiration. Indeed, it banned him from the workplace and at least originally placed him on administrative leave. *Id.*, Tab 1 at 12. Further, its own evidence shows that officials decided on December 4, 2009, that the appellant's appointment would expire on February 20, 2010, based on the appellant's conduct in a December 3, 2009 meeting. *Id.*, Tab 12, Subtab 4F. In that regard, the appellant submitted an excerpt from a January 29, 2009 letter from the agency in which the agency indicated that he would be subject to a 2-year probationary period under his appointment, that the period served as an assessment of his performance and conduct, and that, if his performance and conduct were acceptable, he would "be recommended for retention in the Federal service." *Id.*, Tab 7 at 23. Thus, given the WPA's broad remedial purpose, we find that the statutory language and *Fishbein*, 102 M.S.P.R. 4, do not preclude this appeal.

The administrative judge erred in finding the appellant's allegation concerning his placement on administrative leave moot.

¶14 Placement on administrative leave is a "personnel action" under 5 U.S.C. § 2302(a)(2)(A) for purposes of an IRA appeal. *See, e.g., Hagen v. Department of Transportation*, 103 M.S.P.R. 595, ¶ 13 (2006). Here, the agency asserted that Zoon rescinded her decision to place the appellant on administrative leave and submitted evidence to support its assertion that he had not been placed on administrative leave. IAF, Tab 13 at 14 and Ex. 2. While the administrative judge may consider such evidence in determining jurisdiction, he may not weigh it to resolve conflicting assertions. *See, e.g., Ingram*, 114 M.S.P.R. 43, ¶ 10.

¶15 In finding the issue moot, the administrative judge referred to the appellant's statement quoted above. However, in context, the appellant did not agree that the information was moot until he received further information. IAF, Tab 15 at 5. Consistent with this, the appellant asserts on petition for review that

he submitted a discovery request to the agency to obtain the personnel folder to see whether it contained any documents referring to his administrative leave or access restrictions, that the administrative judge stayed discovery, and that he was entitled to discovery relevant to the jurisdictional issue before the administrative judge dismissed his appeal for lack of jurisdiction. PFR at 6-8; *see also* IAF, Tabs 9-11. In any event, the appellant requested consequential damages. *Id.*, Tab 1 at 5. As he also points out, PFR at 7-8, the Board has held that, even when the agency has completely rescinded the action at issue in an IRA appeal, the appeal is not moot if the appellant has outstanding, viable claims for consequential damages or corrective action. *See, e.g.*, *Massie v. Department of Transportation*, 114 M.S.P.R. 155, ¶ 18 (2010).

The administrative judge must determine whether the appellant is an "employee" under 5 U.S.C. § 2105(a) entitled to bring an IRA appeal.

¶16 Under the WPA, an agency[4] may not take or threaten to take certain personnel actions against "an employee" in a "covered position" because of a protected whistleblowing disclosure. 5 U.S.C. § 2302(a)(2), (b)(8); *Fishbein*, 102 M.S.P.R. 4, ¶ 11. To be an "employee" under 5 U.S.C. § 1221(a), an individual must meet the definition of "employee" under 5 U.S.C. § 2105(a). *Fishbein*, 102 M.S.P.R. 4, ¶¶ 12, 14. That statute defines "employee," in relevant part, as an individual: (1) appointed in the civil service by a named federal official acting in his official capacity; (2) engaged in the performance of a federal function under authority of law or an executive act; and (3) under the supervision of a named federal official while engaged in the performance of the duties of his position. 5 U.S.C. § 2105(a); *Fishbein*, 102 M.S.P.R. 4, ¶ 14.

¶17 We find that the appellant was "appointed in the civil service." *See Fishbein*, 102 M.S.P.R. 4, ¶ 13; IAF, Tab 12, Subtab 4N. Although it appears

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[4] The agency is covered under the WPA. *See* 5 U.S.C. §§ 101, 105, 2302(a)(2)(C); *Fishbein*, 102 M.S.P.R. 4, ¶ 11 n.4.

that the appellant also meets the other requirements for being considered an "employee," the evidence does not establish that the appellant was appointed by or subject to the supervision of an individual named under 5 U.S.C. § 2105(a)(1) and was engaged in the performance of a federal function under authority of law or executive act. Thus, on remand, after affording the parties the opportunity to submit evidence and argument on the issue, the administrative judge shall determine whether the appellant meets the definition of "employee" under 5 U.S.C. § 2105. *See Fishbein*, 102 M.S.P.R. 4, ¶ 14.

¶18 Assuming that the appellant was properly appointed to his position, we find that the appellant was in a "covered position" under the WPA. *See* 5 U.S.C. § 2302(a)(2)(A) & (B). As previously noted, the evidence indicates that the appellant was appointed to a position in the "excepted service." IAF, Tab 12, Subtab 4N. The record does not indicate that the appellant's position was excepted from the competitive service for a reason listed in 5 U.S.C. § 2302(a)(2)(B). Thus, his position was a "covered position" under 5 U.S.C. § 2302(a)(2)(B). *See Fishbein*, 102 M.S.P.R. 4, ¶ 15.

The appellant has otherwise established jurisdiction over his IRA appeal.

The standard for establishing jurisdiction

¶19 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes non-frivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). The jurisdictional threshold is met if the appellant presents non-frivolous allegations that he made a protected disclosure that was a contributing factor to a personnel action. *See, e.g., Ingram*, 114 M.S.P.R. 43, ¶ 10. Whether allegations are non-frivolous is determined on the basis of the written record. *Spencer v. Department of the*

Navy, 327 F.3d 1354, 1356 (Fed. Cir. 2003). Any doubt or ambiguity as to whether the appellant made non-frivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *E.g.*, *Ingram*, 114 M.S.P.R. 43, ¶ 10. In cases involving multiple alleged protected disclosures and multiple alleged personnel actions, the Board has jurisdiction where the appellant has exhausted his administrative remedies before OSC and makes a non-frivolous allegation that at least one alleged personnel action was taken for at least one alleged protected disclosure. *E.g.*, *Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 12 (2010).

Exhaustion of remedy before OSC; personnel action

¶20 The record shows that the appellant exhausted his remedy before OSC, and, as discussed above, made a non-frivolous allegation that he was the subject of covered personnel actions. IAF, Tab 1 at 13, Tab 6 at 3-5, 9-10. We note in that regard that our analysis of the appellant's allegations of protected whistleblowing is not limited to or governed by the particular categories of wrongdoing cited by the appellant. The purpose of the exhaustion requirement is to give OSC a sufficient basis to pursue an investigation that might lead to corrective action. The Board does not require an appellant to correctly label the category of wrongdoing under 5 U.S.C. § 2302(b)(8) because OSC can be expected to know which categories of wrongdoing might be implicated by a particular set of factual allegations. *Lane*, 115 M.S.P.R. 342, ¶ 13.

Non-frivolous allegation of a protected disclosure

¶*21* A protected disclosure under 5 U.S.C. § 2302(b)(8) is any disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *Ingram*, 114 M.S.P.R. 43, ¶ 9. The proper test for determining whether an employee had a reasonable belief that his disclosures revealed misconduct

prohibited under the WPA is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA. *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999).

Disclosures to Schwartz

¶22 The appellant alleged that in May 2009, he mentioned in a conversation with Schwartz that he believed that Matzinger had violated 5 C.F.R. § 2635.702 by hiring Deborah Wagner, who was doing personal "business" for her. He asserted that a September 8, 2009 agency e-mail sent by Wagner to his wife, Dr. Tirumalai Kamala,[5] should be found in Kamala's agency e-mail account personal computer folder entitled "Ghost." IAF, Tab 1 at 6, Tab 4 at 6. He submitted a 2004 policy statement concerning the use of contract workers. *Id.*, Tab 6 at 12. He also submitted a December 2, 2009 e-mail to Schwartz and Matzinger alleging that Wagner's hiring violated that policy. *Id.* at 13.

¶23 Complaints to a supervisor concerning wrongdoing by other supervisors or employees may constitute protected disclosures under the WPA. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1351 (Fed. Cir. 2001); *Ingram*, 114 M.S.P.R. 43, ¶ 13. Further, the appellant identified a regulation that he believed that Matzinger had violated. We are unable to determine from the record, however, whether the appellant made a non-frivolous allegation that he made a protected disclosure. The appellant again asserts that the administrative judge abused his discretion in granting the agency's motion, over the appellant's objection, and staying discovery pending his jurisdictional determination. PFR at 6; *see* IAF, Tabs 9-11. The appellant specifically asserted that, in Wagner's e-mail, she stated that she was doing Matzinger's "business" outside the

[5] Kamala was a contract employee working at NIH. The evidence indicates that the agency terminated her project on December 9, 2009, when it placed the appellant on administrative leave. IAF, Tab 1 at 9, Tab 12, Subtab 4K.

laboratory and that he had asked the agency for the e-mail in his discovery request. IAF, Tab 15 at 12-13. Thus, on remand, if the administrative judge determines that the appellant is an "employee" entitled to file an IRA appeal, he should grant the appellant an opportunity to obtain this relevant evidence on discovery. *See, e.g., Massie*, 114 M.S.P.R. 155, ¶ 19 n.2.

¶24 The appellant alleged that in the same conversation he mentioned to Schwartz that he believed that LCMI Research Fellow Dr. Akgul Akpinarli had violated 31 U.S.C. § 3729 by using NIAID intramural funds to buy reagents to support an unassociated research project. IAF, Tab 1 at 6, Tab 4 at 6. The appellant submitted an unexplained handwritten document listing amounts of money and dates to support his allegations of financial irregularities. *Id.*, Tab 6 at 11, Tab 15 at 13. We find that the appellant's submissions fail to allege facts that would evidence a reasonable belief that he was disclosing a violation of law. Thus, the appellant has failed to make a non-frivolous allegation of a protected disclosure in that regard.

Disclosures to Matzinger

¶25 The appellant alleged that in August 2009, he mentioned in a conversation with Matzinger that he believed that she had violated 31 U.S.C. § 3729 by using a hemophilia grant in an unrelated project. IAF, Tab 1 at 7, Tab 4 at 6. Under the WPA, when an employee reports or states that there has been misconduct by a wrongdoer to the wrongdoer, the employee is not making a "protected disclosure" of misconduct. *Huffman*, 263 F.3d at 1350. Therefore, even if the appellant made the disclosure, he has not made a non-frivolous allegation that it constituted a protected disclosure.

¶26 The appellant alleged that, in his August 3, 2009 e-mail to Matzinger, he mentioned that he believed that Akpinarli had violated 31 U.S.C. § 3729. IAF, Tab 1 at 7, Tab 4 at 6, 10. For the reasons discussed above, we find that this does not constitute a non-frivolous allegation of a protected disclosure.

¶27 The appellant further alleged that, in his e-mail to Matzinger, he mentioned that he believed that Schwartz had violated 7 U.S.C. § 2143(d)(4) and corresponding NIH policy by not following methods whereby deficiencies in animal care and treatment should be reported. He stated that between March and June 2008, on two occasions, Kamala and he observed a contract employee violating Animal Care and Use Committee (ACUC) protocol in euthanizing mice; Kamala reported the violation to Schwartz; and Schwartz stated that he would take care of it. The appellant found out in 2009, however, that Schwartz had failed to report the violation to ACUC in violation of 7 U.S.C. § 2143(d)(4) and NIH policy. IAF, Tab 1 at 7, Tab 4 at 6-7, 10.

¶28 We find that the appellant has made a non-frivolous allegation that he made a protected disclosure. As previously noted, complaints to a supervisor concerning wrongdoing by other supervisors or employees may constitute protected disclosures under the WPA. *See Huffman*, 263 F.3d at 1351; *Ingram*, 114 M.S.P.R. 43, ¶ 13. Thus, the appellant could make a protected disclosure to Matzinger regarding Schwartz's alleged failure to report the inhumane euthanasia to ACUC, given that she did not participate in the challenged wrongdoing. *See Ingram*, 114 M.S.P.R. 43, ¶ 13.

¶29 The appellant further submitted evidence that a reasonable person in his position would find that Schwartz's alleged failure to report the inhumane euthanasia constituted a violation of law, rule, or regulation. Specifically, he submitted a May 27, 2005 memorandum from Dr. Michael M. Gottesman, M.D., Deputy Director for Intramural Research, NIH, entitled "Communicating Animal Care and Use Concerns within the NIH Intramural Research Program." Gottesman stated that the "care and use of animals in NIH research requires compliance with Federal laws, regulations and policies"; that anyone who has concerns regarding the care and use of animals in NIH research should voice that concern; and that incidents involving, among other things, "failure to adhere to ACUC-approved protocols" must be reported to the ACUC within 24 hours. IAF,

Tab 4 at 8. The appellant also submitted December 2009 e-mails from NIAID ACUC Chairman Ted Torrey [6] confirming that the euthanasia method was improper and that Schwartz corroborated having received the report from Kamala, although Schwartz estimated that it was in 2007 instead of in 2008. *Id.*, Tab 6 at 6-7. The appellant further submitted an April 30, 2010 letter to the appellant and Kamala from Axel Wolff, Director, Division of Compliance Oversight, Office of Laboratory Animal Welfare (OLAW). Wolff stated that the OLAW had investigated and confirmed that on two occasions mice were inappropriately euthanized by exposure to carbon dioxide generated by dry ice, a method classified as unacceptable in the revised American Veterinary Medical Association Guidelines on Euthanasia. *Id.*, Tab 3 at 4, Tab 12, Subtab 4A. We thus find that the appellant has made a non-frivolous allegation that he made a protected disclosure. *See, e.g.*, *Ingram*, 114 M.S.P.R. 43, ¶ 19.

Disclosures to Zoon

¶30 The appellant further alleged that, on December 9, 2009, he reported these matters to Zoon. IAF, Tab 1 at 8, Tab 4 at 7, Tab 6 at 9-10. He also submitted a December 4, 2009 e-mail to Zoon alleging that Schwartz did not report the violation of euthanasia protocol to the ACUC. *Id.*, Tab 3 at 4. For the reasons discussed above, we find that we cannot make a determination concerning whether the appellant made a non-frivolous allegation that Matzinger violated a law, rule, or regulation by hiring Wagner; that the appellant failed to make a non-frivolous allegation that Akpinarli violated a law, rule, or regulation; and that the appellant made a non-frivolous allegation that Schwartz violated a law, rule, or

[6] The appellant acknowledged that Zoon informed Torrey about the allegation. IAF, Tab 7 at 9.

regulation.[7] We find that, to the extent that the appellant reported to Zoon that Matzinger violated a law, rule, or regulation by using a hemophilia grant in an unrelated project, he failed to allege facts that would evidence a reasonable belief that he was disclosing a violation of law. Thus, he has failed to make a non-frivolous allegation of a protected disclosure in that regard.

Non-frivolous allegation of contributing factor

¶31 The term "contributing factor" means any disclosure that affects an agency's decision to threaten, propose, take or not take a personnel action with respect to the individual making the disclosure. 5 C.F.R. § 1209.4(c). An employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor. 5 U.S.C. § 1221(e)(1); *Lane*, 115 M.S.P.R. 342, ¶ 34. To satisfy the test, the appellant need demonstrate only that the fact of, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way. *Id.*

¶32 We find that the appellant has made a non-frivolous allegation that a protected disclosure was a contributing factor in the personnel actions. The record reflects that Zoon knew of his disclosures. IAF, Tab 1 at 6-9, 11-12, Tab 3 at 4. Further, the dates that the appellant made his disclosures, that is, May through December 2009, were within such a period of time as to be considered a contributing factor in the agency's December 2009 initial decision to place him on administrative leave and its December 2009 and February 2010 decisions not to renew or extend his appointment. *See, e.g., Lane*, 115 M.S.P.R. 342, ¶ 35.

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[7] Even though Zoon allegedly took the personnel actions against him, the appellant could still make a protected disclosure to her because she was not the wrongdoer for purposes of the disclosure. *See Ingram*, 114 M.S.P.R. 43, ¶ 15.

Thus, the appellant non-frivolously alleged that his disclosures were a contributing factor in the personnel actions. *See*, *e.g.*, *Massie*, 114 M.S.P.R. 155, ¶¶ 14-15; *Weed*, 113 M.S.P.R. 221, ¶ 22.

ORDER

¶33 Accordingly, we vacate the initial decision and remand this appeal to the Washington Regional Office for further proceedings consistent with this Opinion and Order. If the administrative judge finds that the appellant is an "employee" under 5 U.S.C. § 2105(a) entitled to bring an IRA appeal, he shall afford the appellant discovery as discussed in this Opinion and Order, hold a hearing, and adjudicate the merits of the appellant's IRA appeal.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.